TOPICAL INDEX

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

REPLY BRIEF OF APPELLANTS

I

There is no Constitutional authority for maritime jurisdiction of the Federal Se: shoreward of navigable waters, but if there is, it is not exclusive, but concurrent with state jurisdiction.

In their brief, Appellees and their amici reassert the principal thrust of the District Court opinion: First, that Chapter 376, Florida Statutes (1970) ("The Florida Act") is an expression of substantive maritime law and, second, that as such it trespasses on an exclusive federal domain because matters maritime are constitutionally immune from state action.

Under opinions of this Court, however, torts consummated on other than navigable waters were not maritime in nature, even though the act giving rise to a claim commenced at sea. Thus, if a structure on land, a bridge or a pier, were damaged by a vessel, admiralty courts would not hear the cause. The Plymouth, 70 U.S. (3 Wall.) 20 (1865); Ex Parte Phenix Ins. Co., 118 U.S. 610 (1886); Johnson v. Chicago & Pacific Elevator Co., 119 U.S. 388 (1886); Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co., 208 U.S. 316 (1908); The Troy, 208 U.S. 321 (1908); Martin v. West, 222 U.S. 191 (1911). But see, Mr. Justice Brown's concurrence in The Blackheath, 195 U.S. 361 (1904).

The court's earliest consideration of matters allegedly maritime consistently applied this locality test, first bounded by "ebb and flow of the tide," The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825), and subsequently broadened to navigable waters. The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). Article III, Section 2, United States Constitution, describes the grant of federal jurisdiction over admiralty within perimeters of that which is substantively maritime. In case of tort, the "historic view of this court" has been that substance is determined by locality. Victory Carriers, Inc. v. Law, 404 U.S. 1064 (1971), Grant Smith-Porter Ship Co. v. Rohde, 259 U.S. 469 (1922).

The traditional admiralty domain in torts having been navigable waters, it is

a denial of that tradition to extend federal maritime jurisdiction (and substantive maritime law) to torts consummated on land. This tradition has been denied twice.

Two weeks before the Court reiterated the locality test of admiralty tort jurisdiction in Martin v. West, 222 U.S. 191 (1911), it decided Richardson v. Harmon, 222 U.S. 96 (1911), where a tort claim arose from a collision between a vessel and a bridge, and a limitation proceeding was upheld despite the admittedly non-maritime nature of the tort.

Both cases involved collision between a vessel and a bridge. Neither of the bridges were deemed to be aids to navigation. Both cases recognized the non-maritime nature of the occurrence. But Harmon was expressly decided on the basis of the 18th Section of the Limitation of Liability Act of 1884, while Martin v. West involved application of a state statute and, presumably, no limitation proceeding. What is important is that both cases recognized that a sea-to-shore tort was non-maritime in nature. It should follow that if a sea-to-shore tort is non-maritime, then it is plainly beyond the purview of Article III, Section 2, United States Constitution. How can it be said, then, that the prescribing of substantive remedies for sea-to-shore torts is exclusively

a Federal prerogative? Traditionally, it is not.[1]

Congress ignored this tradition in 1948 when it extended admiralty jurisdiction landward from navigable waters, establishing a beachhead of rules, limitations and defenses peculiar to the law of the sea well within the dryland dominion of state jurisdiction (See pp. 52-57, Brief of Appellants) thereby rendering admiralty tort jurisdiction amphibious. (62 Stat. 496, 46 U.S.C. §740). This raises two comments:

Firstly, since this Court alone has power to construe the constitutional grant, Congress may neither enlarge nor restrict its jurisdiction. The Steamer St. Lawrence, 66 U.S. (1 Black) 523, 527 (1861). Congress has power to describe what the maritime law shall be, The Lottawanna, 88 U.S. (21 Wall.) 558, 577 (1874), but it must necessarily act within the perimeters of substantive admiralty and maritime jurisdiction established by this Court. The Belfast, 74 U.S. (7 Wall.) 624, 636-641, (1868); Crowell v. Benson, 285 U.S. 22, 55 (1931). In extending maritime jurisdiction beyond established concepts of

1. To the extent, however, that Richardson v. Harmon would authorize limitation proceedings to frustrate recovery under a state act such as Chapter 376, Florida Statutes, the Court is asked to overrule it or appropriately to limit its application.

the "traditional view of this court," Victory Carriers v. Law, 404 U.S. 1064 (1971), Congress exceeded its authority. See the rationale underlying Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), and Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924), wherein Congress was precluded from authorizing state legislation which extended or limited operation of substantive maritime law involving state workmen's compensation benefits for stevedores working on board ships.

Yet there was no question that states could provide such benefits for the same individuals employed pierside.

If states have power to provide workmen's compensation to longshoremen injured by accidents occurring on the dock, under the theory that the pier is part of the land, and that application of state law on a pier (land) would not conflict with uniform federal maritime law, State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922), it is difficult to conceive of a reason why the shoreline demarcation should be erased in sea-to-shore tort occurrences involving massive oil-spill pollution of state waters. It is submitted that the line between maritime and non-maritime is still valid, and that admiralty is no more offended by the State Act than it would be by state regulation of the speed of vessels in harbor to control and prevent damage to piers (land) and other vessels caused by violent wakes.

Secondly, even if congressional power lies to ignore judicially imposed limits of Article III, Section 2, United States Constitution, so that from June 19, 1948 forward sea-to-shore torts may be heard in admiralty, the Admiralty Extension Act must be recognized for the limits it imposes upon the federal jurisdiction it has created.

There is no indication in the Act that the federal jurisdiction it extends has the nature of an exclusive domain. Yet, had Congress intended such a result it would have been easily accomplished. As an example, the Court's attention is invited to the Ships Mortgage Act of 1920, 41 Stat. 1003, 46 U.S.C. 951, where exclusivity is spelled out in conclusive terms. See, generally, The Thomas Barlum, 293 U.S. 21 (1934). And without a clear statement of exclusive Federal jurisdiction in the Act, it may be assumed that the Judiciary Act, 28 U.S.C. §1333, means what it says.

We are aware of no express repeal or restrictive modification of the Judiciary Act of 1789 (1 Stat. 73, as amended, 28 U.S.C., §1333). Common law remedies are still saved to suitors. Arguably, the common law emphasis of today's Judiciary Act is stronger than it was in 1789. Unless a matter is of admiralty or maritime jurisdiction (and sea-to-shore torts were not), then all other remedies available in all other cases are outside the exclusive original jurisdiction of United States district courts.

If the "saving to suitors" clause of 28 U.S.C. §1333 has any meaning at all, it must follow that state courts have some jurisdiction in cases affecting admiralty or maritime jurisdiction.[2] Such cases must include (or, perhaps, even be limited to) sea-to-shore torts, where both federal (navigable waters) and state (land) interests are thrown into issue. The locality test, if the traditional view of this Court is relevant in the instant context, would continue a viable basis for determining appropriate jurisdiction and applicable substantive law. Otherwise, concurrent jurisdiction spoken to in Justice Story's opinion in Thomas v. Lane 23 Fed. Cas. 957 (No. 13,902) (C.C.D. Maine, 1813), quoted with approval in Taylor v. Carryl, 61 U.S. (20 How.) 583, 598 (1857), referred to by Justice Brennan dissenting in Romero v. International Terminal Operating Co., 358 U.S. 354, 404-405 (1959), and quoted again in Victory Carriers v. Law, 404 U.S. 1064 (1971), has scant meaning.

The State of Florida submits that concurrent jurisdiction still means that

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[2] "It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied ...." Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

which Mr. Justice Holmes described in The Hamilton, 207 U.S. 398 (1907). Substantive state law is appropriate to meet exigencies of an age of super tankers (so long as it is not in conflict with federal law) regardless of whether admiralty is extended or not.

Instances are described in briefs of The American Bar Association and the Maritime Law Association of the United States, amici curiae, where extension of admiralty in certain cases would preclude harsh results rendered by operation of state common law tort rules. But what is overlooked in this recitation of "evils the Act was designed to cure" (Brief amicus curiae of the Maritime Law Association, p. 15) is the understandable concern of the state that strict application of admiralty law in the instance of a massive oil-spill in state waters would leave non-maritime interests without a meaningful remedy. In re Barracuda Tanker Corp., 281 F. Supp., 228 (S.D.N.Y., 1968) modified 409 F.2d 1013.

Finally, briefs filed by Appellees, and amici curiae in their behalf, fail to consider legislative history of the Admiralty Extension Act.

> Adoption of the bill will not create new causes of action. It merely specifically directs the courts to exercise the admiralty

> and maritime jurisdiction of the United States already authorized by the Judiciary Acts. Moreover, there still will remain available the right to a common-law remedy which the Judiciary Acts ... have expressly saved to claimants. * * * (Senate Report No. 1593, June 11, 1948 [To accompany H.R. 238]; House Report No. 1523, March 8, 1948, 80th Cong., 2d Sess., 1948)

It is difficult to reconcile this statement of congressional intent that common-law remedies have been expressly saved to claimants - and by necessary inference that concurrent jurisdiction still exists - with the statement of the American Bar Association in its brief amicus curiae at page 4 that "[s]ince the general maritime law is federal, under the Supremacy Clause, no state statute or rule of law in conflict with it is valid."

This statement presumes that regulation of land - consummated torts is within the purview of "general maritime law." It also presumes that anything generally maritime is exclusively Federal under the Supremacy Clause. It presumes too much. "Saving to suitors" says that it does.

It is submitted that Article III, Section 2, United States Constitution, is a limitation as much as it is a grant of power to the federal judiciary; that the judicial power there granted is limited to jurisdiction over cases of admiralty and maritime jurisdiction; that definitions of what constitutes an "admiralty and maritime" cause of action have been (and should continue to be) developed within perimeters of navigable waters; that Congress has no power to extend the constitutional grant of judicial power beyond limits expressed in Article III, Section 2; and that, therefore, a reliance upon assertions of congressional authority in the Admiralty Extension Act to nullify state attempts to provide a meaningful remedy in the event of massive oil-spill pollution of state waters, must fail.

But even if Congress has authority to extend power of the federal judiciary across the mean high-water mark of navigable waters and into the states, it is submitted that such power cannot be deemed to be exclusive. If admiralty and maritime jurisdiction extends landward at all, it is at best concurrent.

States have prerogatives within their borders, and protection of citizens, property, and the natural resources of its environment are some of them. State legislation seeking to accomplish this purpose cannot be erased for reason of an exclusive federal jurisdiction.

There is no maritime jurisdiction at all shoreward of navigable waters, but if there is, it is concurrent.

II.

Water pollution is no more a maritime tort than is smashing a pier with a barge. The impetus for both occurs at sea, but their consummation is a matter of dry-land law.

The natural environment of the State of Florida is a valuable asset of the people of the state. No one should question that truism. An important aspect of the state's economy depends squarely upon tourist reaction to the environment.

Clean water for drinking and for recreation is a major factor of Florida's salubrious environment. Pollution by oil or other substances has a highly deleterious effect upon waterways of the state. Cf. United States v. Standard Oil Co., 384 U.S. 224 (1966). If 31,000 gallons of crude oil discharged from the grounded tanker P.W. Thirtle off Newport, Rhode Island, could virtually destroy the entire oyster fishery of Narragansett Bay, or destroy the food chain on which are dependent large populations of commercial fishes (see pages 29-30, Brief of Appellants; 10 Harvard International Law, J. 316 at p. 321 [1970]), then it should be clear

that a massive oil-spill in coastal waters of the state would cause serious damage to the state -- even though the slick itself never touched beach or pier.

At pages 7-8 of its brief amicus curiae, the Maritime Law Association describes some of the "bristles" of the Florida Act purportedly conflicting with general maritime law and Federal statutes.

But general maritime law is not controlling in cases of non-maritime torts for reasons set out above, and, as described under Point II in Appellants' brief, the Florida Act is not in conflict with the Federal Water Quality Improvement Act of 1970, 33 U.S.C. §§1161-75, (Appendix pp. 75-90), but is a legitimate response to that Act. Moreover, since the Federal Act only provides for recovery to agencies of the Federal government for clean-up costs, and expressly disclaims pre-emption (§1161 (o)(2), Appendix page 87), it is difficult to follow the oft-repeated argument that the Act creates an irreconciable conflict with any state legislation regulating oil-spill pollution of state waters. There is no conflict between the Federal and Florida Acts. See, Analysis of the Decision of the Florida District Court in the Case of American Waterways Operators, Inc., et al, v. Askew, Report to the Committee on Public Works, United States Senate, 92nd Congress,

2d Sess. Ser. No. 92-27 (August, 1972).

III.

If admiralty is extended shoreward to foreclose all but Federal substantive law in context of a massive oil-spill, the limited Liability Act would frustrate recovery of damages to the State and its citizens.

In the final analysis, abstract concepts of uniformity in maritime law must give way before a legitimate exercise of the State police power. It is within that power to determine that the community should be beautiful as well as healthy and clear. Berman v. Parker, 348 U.S. 26 (1954). Maintaining physical beauty of the environment is a proper exercise of the police power. E. B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970), cert. den., 400 U.S. 805. The state has not only the power, but the duty to take adequate steps to preserve the peace and protect the property of its residents Thornhill v. State of Alabama, 310 U.S. 88 (1945). And there is judicial acknowledgment of the state's necessity to invoke its police power to protect aesthetics crucial to tourism. Opinion of Justices, 103 N.H. 268, 169 A.2d 762. Appellees and their amici curiae would deny or ignore the foregoing police power

authority in a doctrinaire allegiance to the abstraction of uniformity, and an alleged preeminence of Federal prerogatives in cases of massive oil-spill pollution of state territorial waters.

But underlying their vigorous attack on the Florida Act is a fact which cannot be denied: if the Admiralty Extension Act is sufficiently vital to subject sea-to-shore torts to the control of maritime law, then states and their citizens are unlikely candidates for recovery following an oil-spill. If fault liability can be proven at all, the Limited Liability Act would blunt recovery and make a mockery of remedies afforded in admiralty.

Applied in this context, the Limited Liability Act effectively precludes recourse. It permits of a wrong and affirmatively acts to prevent a remedy. It offends the Fifth Amendment right to due process of law before deprivation of property. It is the inescapable result of transplanting maritime roots from their natural element in navigable waters to dry land and demanding that they work equitably, of forcing limitations upon unwilling and unnatural subjects. Admiralty is not amphibious. To insist that it be extended into common law courts would be to compel the transplant of 200 years of respected law and result in no justice.

If uniformity and harmony of maritime law are to continue as respected elements of traditional jurisprudence, then

admiralty must remain at sea.

CONCLUSION

Fears expressed by maritime interests that the Florida Act will unleash an avalanche of conflicting and confusing state regulations upon vessels are simply unfounded. No regulations specifying minimum requirements as to containment gear have yet been issued by the State. Presumably, they would follow Coast Guard requirements. To suggest that the State of Florida would regulate gear requirements unduly restrictive by reasonable Coast Guard standards and that therefore the Florida Act is unconstitutional is to speculate absurdly.

Florida does not aim to fine for non-compliance or to sue for damage. Florida aims to make it more to the interests of ship-owners and charterers to assure more careful and cautious operation of tankers in state waters. The Florida Act is a shield, not a sword. It is a valid expression of the state's police power. It should be sustained. The decision of the District Court should be reversed.

Respectfully submitted,

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